

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 - - - - - x

5 In the Matter of:

6 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

7 Debtor.

8 - - - - - x

9 Adv. Case No. 08-01789-smb

10 - - - - - x

11 SECURITIES INVESTOR PROTECTION CORPORATION,

12 Plaintiff,

13 v.

14 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

15 Defendant.

16 - - - - - x

17 Adv. Case No. 10-04889-smb

18 - - - - - x

19 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF THE BERNARD

20 L. MADOFF TRUST,

21 Plaintiff,

22 v.

23 THE ESTATE OF ROBERT SHERVYR,

24 Defendant.

25 - - - - - x

1 United States Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004
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5 March 17, 2020
6 10:04 AM
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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE
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25 ECRO: SHEA

1 HEARING re 08-01789-smb Conference on Letter of Baker &
2 Hostetler dated March 5, 2020 re Mediation

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4 HEARING re 10-04889-smb Status Conference

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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8 BY: HELEN CHAITMAN (TELEPHONICALLY)

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15 BY: NICHOLAS J. CREMONA

16

17 ALSO PRESENT TELEPHONICALLY:

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19 KEVIN H. BELL

20 DAVID J. SHEEHAN

21 JENNIFER ALLIM

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Good morning. Welcome.
3 Let's begin with the Madoff matters.

4 MS. CHAITMAN, are you on the phone?

5 MS. CHAITMAN: Yes, I am, Your Honor. Good
6 morning.

7 THE COURT: Good morning. Okay. Just to expedite
8 this a little bit, because it gets a little difficult
9 sometimes on the phone, with respect to the mediation
10 issues, as I understand it, the parties were unable to agree
11 on a mediator, or even more than one mediator might be the
12 more accurate way to say it. And then the Trustee raised
13 the question of whether mediation should just be dispensed
14 with as a waste of time and money. Is that a fair
15 statement, Mr. Cremona?

16 MR. CREMONA: I agree with that, Your Honor.

17 THE COURT: Okay. So let me hear from you, Ms.
18 Chaitman, on what your position is on those issues.

19 MS. CHAITMAN: Sure, Your Honor. I did have a few
20 mediations with the Trustee and they were a waste of time,
21 because the mediator's position was that the Trustee should
22 be paid 100 percent of what he was suing for.

23 THE COURT: Well, don't tell me what the mediator
24 said. But you're telling me --

25 MS. CHAITMAN: Okay.

1 THE COURT: -- that there were no resolutions, and
2 in your view, as I understand it, it's not likely that
3 mediation of these 60 cases is going to make it -- is going
4 to be helpful, and it's going to be a waste of time and
5 money?

6 MS. CHAITMAN: Well, I came back to the Trustee,
7 when the Trustee approached me within the last few months,
8 and I said that at this point I thought it would be a
9 constructive step for us to go through mediation of all the
10 cases that are trial ready. And I said that I wanted to
11 have a mediator who, in the view of my clients, was
12 impartial. And I suggested someone and the Trustee, in
13 fact, agreed to that person, and we have one mediation
14 scheduled. And I would hope that we could schedule more
15 mediations with this same person, or someone else from JAMS,
16 J-A-M-S, that's where this mediator is from.

17 And the Trustee then -- the Trustee proposed a few
18 former bankruptcy judges from the District of New Jersey,
19 and I came back and said that those were not acceptable to
20 me, but I would like to go forward with someone from JAMS,
21 if the one mediator that we've selected already, is not
22 satisfactory to the Trustee after the first mediation that
23 we do, which is scheduled for early -- for next month. And
24 then the Trustee wrote to the Court. I would very much like
25 to schedule mediations, but I want to assume my clients for

1 whom -- for many of whom they have to travel to New York to
2 the mediation, and I want to assure them that I don't think
3 this is going to be a waste of time, and I want to have
4 confidence that the mediator will be a hundred percent
5 impartial.

6 THE COURT: Mr. Cremona?

7 MR. CREMONA: Your Honor, if I may just respond to
8 a few points. Ms. Chaitman indicated that we've had some
9 mediations that have been, in her words, a waste of time.
10 Just by way of background, Your Honor, we started this
11 liquidation proceeding with over a thousand good faith
12 actions, as we stand here today, we have roughly 110. We've
13 commenced hundreds of mediations, we've -- which have
14 resulted, in part, in over 600 documented settlements. So I
15 --

16 THE COURT: Any with Ms. Chaitman's clients?

17 MR. CREMONA: None. Not while she was counsel.
18 We've settled several cases after she was removed by her
19 client.

20 So I would submit, Your Honor, that mediation has
21 been a very, very successful tool for the Trustee and has
22 enabled us to settle the vast majority of these cases. And
23 I would submit that these 60 remaining cases with Ms.
24 Chaitman, just by virtue of the numbers I've just described
25 to you, are outliers. We've settled over 75 percent of the

1 cases.

2 THE COURT: But you haven't settled any with her.
3 So let's --

4 MR. CREMONA: Fair enough.

5 THE COURT: -- I understand what mediation does.

6 MR. CREMONA: I just wanted to give you the
7 background there.

8 THE COURT: Let me ask you a different question.
9 These cases are trial ready but for the mediation, as I
10 understand it, right?

11 MR. CREMONA: That's correct.

12 THE COURT: In how many of the 60 cases do I have
13 equitable jurisdiction to render findings and conclusions?
14 In other words, in how many of these were there active
15 claims that had not been disallowed, or deemed disallowed
16 when you filed the adversary proceedings?

17 MR. CREMONA: My understanding is that there were
18 17 cases where no claims have been filed, and the balance of
19 the cases have customer claims filed.

20 THE COURT: That were still alive when you filed
21 the adversary proceedings?

22 MR. CREMONA: Your Honor, it's our position, and
23 we can discuss that in the context of stating that they were
24 all alive at the time that the Trustee commenced the case.
25 And I'm happy to discuss why we show that.

1 THE COURT: Let me tell you what my thought is. I
2 don't have a problem with trying this one mediation that
3 gets scheduled. Is the mediator going forward in light of,
4 you know, the coronavirus?

5 MR. CREMONA: At the moment we have a mediation
6 scheduled for a half day on April 24th at 9 a.m. That's
7 part of the difficulty that we were having with JAMS. And,
8 you know, I have not met Mr. Hurkin-Torres, who Ms. Chaitman
9 is recommending, and who we've agreed to. And I assume he
10 has -- he's more than capable, he just does not have that
11 much availability, which, hence, is why we are out to April
12 24.

13 THE COURT: Things are going to slow down.

14 MR. CREMONA: I understand completely, Your Honor.
15 And everything is fluid. So as of now, that is scheduled to
16 go forward. That's all I can say.

17 THE COURT: Okay. Here's what I thought we should
18 do, and you can respond. Go forward with the one mediation.
19 Given the history of the parties or the counsel, if it
20 doesn't -- if mediation doesn't work, I don't see the
21 purpose to putting everybody through the time and effort of
22 mediation in the 59 other cases.

23 And what I would do -- this is something -- what
24 I've been thinking about doing, and this is something that
25 we talked about two or three years ago, is having a

1 consolidated trial on certain issues that seem to affect
2 every single case. For example, whether the accounts from
3 which the transfers were made were held or owned by BLMIS or
4 Madoff personally. I don't see the reason to try that case
5 -- that issue 60 times, if it can be avoided. This issue of
6 whether or not it was a Ponzi Scheme, and if so, when it
7 began. Whether there are other badges of fraud. I don't
8 know if -- I think that could be done on an omnibus basis,
9 not on a case-by-case basis. And this issue of allocation,
10 when BLMIS was buying T-bills and equity securities through
11 the proprietary trading market, whether it was allocating
12 those trades to customers. It just seems to me that we
13 could try those issues in a consolidated trial. And, you
14 know, then we can have individualized trials on the deposits
15 and withdrawals, once those are resolved, assuming they're
16 resolved in favor of the Trustee.

17 So what I'm suggesting then, for today, go forward
18 with your arbitration, we'll -- I'm sorry, mediation. We'll
19 -- I'll schedule another conference for about two months
20 out, which is May already, we'll do it telephonically.

21 By the way, Mr. Cremona, I'm going to do these --
22 all these conferences telephonically now, we're going to
23 just telework.

24 MR. CREMONA: I understand from the Clerk.

25 THE COURT: And if it works, fine. Then we'll

1 talk about further mediation. If it doesn't work, then I'll
2 just schedule a trial.

3 In the meantime, Mr. Cremona, why don't you send
4 Ms. Chaitman a list of those cases that you believe are
5 subject to the Court's equitable jurisdiction. And by that,
6 I mean, that there was not a disallowed or deemed disallowed
7 claim when you filed the adversary proceeding. If you want
8 to segregate those out and say, we think we have -- the
9 Court has equitable jurisdiction over these as well, fine.
10 But I want to know the cases where it's clear from the
11 record that there's still a live dispute, because there was
12 an objection to the Trustee's determination and that
13 objection has not been resolved. Okay?

14 MR. CREMONA: Understood.

15 THE COURT: So that if the mediation doesn't work
16 out, then we'll be ready for the next step, because these
17 are more than half of the remaining good faith cases, as I
18 understand it.

19 MR. CREMONA: That's correct.

20 THE COURT: All right. Anybody disagree with
21 that? Ms. Chaitman?

22 MS. CHAITMAN: No, that's fine, Your Honor.

23 THE COURT: All right. Let me just give you a
24 date in May. I suspect it's going to be a telephonic, given
25 what's going on. Let's say May 14 at 10:00.

1 All right. Thank you very much. I think that
2 takes care of your one matter. Right, Ms. Chaitman?

3 MR. CREMONA: Actually, Your Honor --

4 MS. CHAITMAN: No, there's --

5 THE COURT: Oh, there's another one?

6 MR. CREMONA: Yeah, the other matter is a request
7 by the Trustee for a 7056 Conference, which we would now
8 like to convert, but I'm happy to discuss that. That's in
9 the Savin case, which is Adversary Proceeding Number 10-
10 4889.

11 THE COURT: You know my view on these summary
12 judgment --

13 MR. CREMONA: I completely --

14 THE COURT: -- motions, particularly on the issues
15 I've identified, I have to try it.

16 MR. CREMONA: I understand. And that's -- what I
17 -- so, Your Honor, when I filed this letter, it was February
18 10, it was in response to a motion to withdraw the reference
19 that Ms. Chaitman filed in the Savin matter, which is now
20 pending before Judge Swain. And the Trustee had since filed
21 his opposition to that motion.

22 THE COURT: Oh, all right.

23 MR. CREMONA: So at that point in time, we had
24 requested a 7056 Conference, but we've gotten subsequent
25 guidance from Your Honor, and subsequent guidance from Judge

1 Broderick, which I think paves the way to try this matter,
2 and I'm happy to articulate why.

3 THE COURT: Was Savin an open claim when you filed
4 the adversary proceeding?

5 MR. CREMONA: Savin had filed a customer claim,
6 and I think -- I'd like to approach this in a twofold way.
7 I think, first off, as Your Honor articulated at the Greiff
8 final pretrial conference, there's a claim on file that
9 submits the Defendant and Claimant to this Court's equitable
10 jurisdiction and we are going forward with the trial there.
11 This case is no different than that one. And I know we have
12 a motion for a stay that we'll talk about tomorrow.

13 THE COURT: Yeah.

14 MR. CREMONA: But our position is that Judge
15 Broderick's (indiscernible) decision was quite clear that
16 this Court's jurisdiction does not fluctuate based on the
17 status of a claim at any point -- given point during that
18 litigation. And in fact, once the claim is filed, you're
19 submitted to the Court's equitable jurisdiction because
20 you've been invoked the debtor/creditor relationship, and
21 that's Langenkamp, that's Granfinanciera, nothing in Stern
22 changes that. And Judge Broderick went through a
23 painstaking Stern analysis and found that that's submission
24 of a claim, number one, submitted that person or entity to
25 the bankruptcy court's jurisdiction.

1 I would also point out, in Footnote 10 of that
2 opinion, Judge Broderick also went into implied consent
3 under Wellness, and pointed out that if these parties have
4 been litigating in the bankruptcy court for ten years,
5 they've also impliedly consented to Your Honor's final
6 adjudicative authority to resolve these claims. So I think
7 that is certainly a basis for Your Honor's jurisdiction.

8 THE COURT: Okay. In the meantime, there's a
9 motion to withdraw the reference and you have mediation
10 scheduled.

11 MR. CREMONA: We do not have mediation scheduled
12 in this matter. But --

13 THE COURT: Oh, I thought in Savin you did?

14 MR. CREMONA: No, in (indiscernible), so that's a
15 different.

16 THE COURT: Oh, I'm sorry.

17 MR. CREMONA: We have been trying to -- you know,
18 that was -- we may have sought to schedule it, but were
19 unable to do so.

20 THE COURT: Well, all right.

21 MR. CREMONA: And so on that basis I think Judge
22 Broderick's decision makes clear that this Court's
23 jurisdiction does not fluctuate.

24 But if Your Honor was -- and you seem to have
25 articulated that you have some concern about a claim being

1 alive or judiciable, and being met with the adversary
2 proceeding, I would like to pass up, if I may approach, the
3 determination from the Trustee in the Savin matter. I know
4 Your Honor --

5 THE COURT: Was there a response to the
6 determination?

7 MR. CREMONA: There is not. There is no objection
8 to this determination.

9 THE COURT: So if there's no objection, then
10 they're deemed disallowed.

11 MR. CREMONA: Well, I'm going to get to that, Your
12 Honor. I think if you look at the language -- so the
13 timing, just so we understand, I know you're focused on the
14 time of filing, as you articulated in your equity
15 jurisdiction opinion. So if you look at page -- well, first
16 of all, the date on the determination is March 15, 2010. I
17 acknowledge that this adversary proceeding wasn't commenced
18 until November of 2010. However --

19 THE COURT: But under the claims order, as I
20 understand it, if there was no objection to the
21 determination, it was deemed disallowed in 30 days?
22 Was that (indiscernible)?

23 MR. CREMONA: Yes. However, if you look at the
24 bold language on page 2, which provides as follows: "Should
25 a final and unappealable court order determine the Trustee

1 is incorrect in his determination of net equity and its
2 corresponding application to the determination of customer
3 claims, the Trustee will be bound by that order and will
4 apply it retroactively to all previously determined customer
5 claims --

6 THE COURT: I got it. So --

7 MR. CREMONA: -- in accordance with the Court's
8 order." Now --

9 THE COURT: So you're saying this is just a
10 contingent, not a final disallowance?

11 MR. CREMONA: Well, because at that point in time
12 net equity did not become a final order until 2012 --

13 THE COURT: Okay.

14 MR. CREMONA: -- two years after the fact. So I -
15 - it is the Trustee's position that in those 40 cases, among
16 Ms. Chaitman and all other customers that have filed claims,
17 they have submitted to this Court's jurisdiction and were
18 met with adversary proceedings, and that's entirely
19 consistent with Your Honor's decision, and Judge Broderick's
20 decision, and several others.

21 THE COURT: Well, I guess, you know, you could
22 make an omnibus motion in these adversary proceedings where
23 there is a question. You're telling me -- well, 17 never
24 filed claims, right?

25 MR. CREMONA: That's correct.

1 THE COURT: All right. So but for the ones where
2 it was deemed disallowed under the claims procedure order, I
3 guess you can make a --

4 MR. CREMONA: And by the way, I apologize, let me
5 just clarify, Your Honor. Of those 40, approximately, and
6 I'll clarify, several have pending objections. It just so
7 happens that in this case there is not a pending objection.

8 THE COURT: Okay. Well, you know, you can think
9 about, since we have the time to do this now, I guess, you
10 can think about a common issue like that and write a letter
11 saying that, you know, you think, based on the boldfaced
12 provisions of this disallowance -- I assume that it's in
13 every one of them, I don't know --

14 MR. CREMONA: That's -- it is.

15 THE COURT: All right. That, you know, there was
16 no final determination, it had to await the definition of
17 net equity or the acceptance of a net investment method and
18 so it was really a live claim until the Supreme Court, I
19 guess, denied certiorari from the Second Circuit's decision.

20 Okay. You can make -- I'm not deciding it now,
21 you can make (indiscernible).

22 MR. CREMONA: I am -- well, Your Honor, at the
23 moment there -- I mean, there's no motion -- absent a motion
24 to stay, I guess there's no reason not to move the case
25 toward trial, as Your Honor indicated in Greiff. I mean,

1 this case is no different at all from that case.

2 THE COURT: All right. I hear you. But in the
3 meantime, I thought what we were going to do, to save time,
4 because I don't want to try 60 cases 60 separate times, is
5 to see how the mediation works, and if it doesn't work,
6 start with a trial on common issues, and this will be part
7 of that determination whether or not I can just enter final
8 orders in all these cases, because there was no final
9 determination of the claim until the Supreme Court denied
10 cert from the net equity decision of the Second Circuit.
11 But we can deal with that at that point.

12 MR. CREMONA: Just one final clarification, Your
13 Honor, just because I don't want to concede or impliedly
14 concede that I think that this determination language is
15 necessary. I believe that Judge Broderick's decision has
16 found that the submission of the claim submits the party to
17 jurisdiction for all purposes.

18 THE COURT: We're repeating ourselves. Let me
19 give you this. So the record is clear, I'm not deciding
20 anything today. I haven't made any determinations, other
21 than to go forward with the (indiscernible) mediation and
22 schedule another conference to determine what the next steps
23 are. Okay?

24 MR. CREMONA: Understood. Thank you, Your Honor.

25 THE COURT: And as far as that motion for summary

1 judgment, you know, I can't tell you not to make the motion,
2 but you know what my views are, that these are factual
3 issues that have to be determined at a trial where I can
4 make findings of fact and conclusions of law. Okay?

5 MR. CREMONA: Understood.

6 THE COURT: All right. That's it. Thanks very
7 much. So May 14th is the date, 10:00.

8 MR. CREMONA: Yes, Your Honor. Thank you.

9 (Whereupon these proceedings were concluded at
10 10:22 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Landanski
Hyde

Digitally signed by Sonya
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Date: March 18, 2020